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ALEXANDER L. STEVAS,
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No. 83-276

In The

Supreme Court of the United States

October Term, 1983

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants

vs.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

SELECTIVE SERVICE SYSTEM, ET AL.,
Appellants

vs.

BRADLEY BOE, ET AL.

On Appeal from the United States District Court for the District of Minnesota

[redacted]

BRIEF OF SWARTHMORE COLLEGE AS AMICUS CURIAE IN SUPPORT OF MOTION TO AFFIRM OF RESPONDENTS MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL. AND BRADLEY BOE, ET AL.

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QUESTIONS PRESENTED

1. Whether Section 1113 of the Department of Defense Authorization Act of 1983—which states that those who fail to register as required by the Military Selective Service Act shall be ineligible for federal educational assistance under Title IV of the Higher Education Act of 1965—is a bill of attainder.

2. Whether Section 1113—which also states that those who wish to receive Title IV assistance and who are required to register must file a statement of compliance with their colleges—compels such persons to incriminate themselves in violation of the Fifth Amendment.

3. Whether Section 1113 of the Department of Defense Authorization Act of 1983 violates the rights to freedom of association and free speech protected by the First Amendment.

4. Whether Section 1113 of the Department of Defense Authorization Act of 1983 violates the right to equal protection under the due process clause of the Fifth Amendment.

5. Whether Section 1113 of the Department of Defense Authorization Act of 1983, in addition to impinging on the constitutional rights identified above, so burdens educational freedom and the quasi-fundamental right to an education that the statute may not be permitted to stand.

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On Appeal from the United States District Court for the District of Minnesota

MOTION BY SWARTHMORE COLLEGE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL. AND BRADLEY BOE, ET AL.

Swarthmore College ("Swarthmore") respectfully moves this Court for leave to file the attached BRIEF OF SWARTHMORE COLLEGE AS AMICUS CURIAE IN SUPPORT OF MOTION TO AFFIRM OF RESPONDENTS MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL. AND BRADLEY BOE, ET

AL. The grounds for the Motion of Swarthmore, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, are stated below.

I. Petitioner and Respondents Have Consented to the Filing of this Brief.

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, Swarthmore requested petitioner, Selective Service System, *et al.* ("the Government") and respondents, Minnesota Public Interest Research Group, *et al.* and Bradley Boe, *et al.*, to consent to the filing of an *amicus curiae* brief in support of the respondents' Motion to Affirm. Both petitioner and respondents have consented to the filing of this brief. *See* App. A, *infra*, 1-3.

II. Interest of Swarthmore College.

Swarthmore College is a small, liberal arts college founded in 1864 by members of the Religious Society of Friends (Quakers). While Swarthmore is financially well-endowed in comparison with most higher educational insitutions in this country, many of its students are heavily dependent upon financial assistance under Title IV of the Higher Education Assistance Act of 1965, 20 U. S. C. § 1070 *et seq.*

For example, in the academic year 1982-83, 58% of Swarthmore's students received Title IV federal assistance. Of that number, 56% were men.

Furthermore, over 83% of the minority students enrolled at Swarthmore in 1982-83 received federal assistance under the Title IV programs. Since all Title IV federal assistance is awarded on a need basis, it is unchallengeable that a reduction of such federal assistance will have a significant, adverse impact on the ability of those with the fewest financial resources to attend Swarthmore College. This will be particularly so for minority students with limited financial resources.

Furthermore, the administrative burden imposed on Swarthmore by the regulations issued by the Department of Education (issued April 11, 1983, 48 Fed. Reg. 15578) to implement Section 1113, when fully phased in two years from now, will be enormous. Swarthmore has previously estimated that merely to implement the new requirements of the statute would require the equivalent of one person working full time for nearly one-half year. Furthermore, when the full effect of the regulations is felt two years hence nearly 50% of the total educational aid made available to Swarthmore students may be delayed while the college and its students are required to go through a number of additional administrative steps in order to qualify for such aid. The impact on Swarthmore and its students will be significant.

III. Questions That Have Not Been Adequately Presented And Their Relevance To The Disposition Of This Case.

Respondents Minnesota Public Interest Research Group, *et al.*, and Bradley Boe, *et al.*, have thoroughly discussed the first two questions presented for review by this Court, *i. e.*, the bill of attainder and self-incrimination

arguments. Swarthmore joins in those arguments and supports respondents' contention that the district court properly decided those issues and that that decision should be summarily affirmed.

However, neither the Government nor respondents have addressed certain other issues central to this case. Those issues, presented to the district court but not decided by it, also support summary affirmance.

First, Section 1113 affects the availability of federal financial aid only to male students of draft registration age. While female students are required to file statements of compliance, the fact that they are not required to register under the Selective Service Act removes the threat that female students will lose their access to federal financial assistance for noncompliance with the registration requirement.

This gender-based distinction in the availability of federal financial aid to students attending post-secondary educational institutions violates the rights of male students to equal protection under the due process clause of the Fifth Amendment. There is no rational basis for imposing a higher burden on males seeking federal educational assistance than on females, yet that is the inevitable result of the implementation of Section 1113.

To make matters worse, the implementation of Section 1113 will have a far greater impact on male students who are members of minority groups than on non-minority students. The experience of Swarthmore shows that the proportion of minority students receiving federal financial assistance is significantly higher than is the proportion of non-minority students. Thus, Section 1113 will impose a double burden on male minority students: 1) in

order to receive federal financial assistance they will be subject, because they are males, to a requirement not imposed on female students; 2) they are more likely to be subject to this requirement because as members of a minority group, they are more likely to require federal financial assistance in order to attend a post-secondary educational institution. In the latter case, Section 1113 violates the rights of such minorities to equal protection under the Fifth Amendment to the Constitution.

Second, the rights to free association and free speech under the First Amendment have not been addressed by either appellants or respondents. Swarthmore is an institution with a strong pacifist history and tradition. The implementation of Section 1113 will adversely affect Swarthmore's ability to attract and keep students with such views, since their ability to obtain federal educational assistance necessary to attend such a college may be adversely affected by this statute. That burden is an unconstitutional impingement on the right to free association and free speech under the First Amendment to the Constitution.

Third, neither appellants nor respondents have addressed the difficult issue of the burden Section 1113 places on the quasi-fundamental right to an education recognized by this Court, in a different context, in *Plyler v. Doe*, 457 U. S. 202, 102 S. Ct. 2382 (1982). The district court, however, recognized that the threat to the ability of students to obtain a post-secondary education constituted irreparable damage sufficient to justify issuing a preliminary, and ultimately a permanent, injunction against the enforcement of Section 1113. *See* Appendix A to Appellants' Jurisdictional Statement, 3a-5a.

Furthermore, the heavy administrative and financial burden imposed on colleges and universities by this statute is an impermissible threat to educational freedom. The threat to free educational institutions, and the burden on the right of students to obtain an education, are factors which weigh heavily against the constitutionality of Section 1113. In considering each of the specific constitutional challenges (bill of attainder, right against self-incrimination, right to equal protection under the due process clause, and the rights to freedom of association and speech) these burdens must be carefully balanced against the arguments the Government has offered in support of the constitutionality of the federal statute.

Swarthmore has an intense interest in the issues involved in this case, both because of its traditions and because of the impact this statute will have on the College and its students. We submit that these issues are too important to permit of anything less than an exposition of the views of at least one of the nation's colleges. Therefore, we respectfully ask the Court's leave to file the attached Brief addressing these issues.

Respectfully submitted,

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Counsel for Swarthmore College

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STATEMENT OF INTEREST AND QUESTIONS PRESENTED

Swarthmore College ("Swarthmore") incorporates by reference the Statement Of Interest and Questions That Have Not Been Adequately Presented and Their Relevance To The Disposition Of This Case as set forth in paragraphs II and III of Swarthmore's Motion For Leave To File Brief As Amicus Curiae which immediately precedes and is bound together with this Brief.

ARGUMENT

I. Swarthmore Urges Affirmance Of The District Court Or Noting Of Probable Jurisdiction With The Opportunity For Full Briefing And Argument.

Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.*, imposes a new and unparalleled burden on students seeking federal educational assistance. Such assistance has long been available under Title IV of the Higher Education Act of 1965, 20 U. S. C. (and Supp. V) 1070 *et seq.* Under the terms of Section 1113, students required to register for military service under Section 3 of the Military Selective Service Act, 50 U. S. C. App. (Supp. 5) 453, are ineligible for federal educational assistance under Title IV unless they have complied with the draft registration requirement. All students, whether subject to the provisions of the Military Selective Service Act or not, are required to file statements of registration compliance prior to receiving Title IV funds.

There can be no serious question that the sole purpose of this requirement is to aid in the enforcement of the draft registration law. Such intertwining of draft registration and education is unjustified and constitutionally offensive.

Swarthmore brings to this case a strong pacifist tradition, and a history of being a center for independent social and political thought. It is critical to such a college that it be able to maintain the heterogeneity of its student body and faculty. Section 1113 endangers that diversity by challenging the ability of certain groups of students—those with limited financial resources—to attend colleges such as Swarthmore.

Further, by making colleges and universities central to the enforcement of its provisions, the statute has imposed a significant financial and administrative burden on all higher educational institutions. In a time of decreasing resources, such burdens are unacceptable. They become particularly offensive when they are imposed with no educational objective or intent.

Section 1113 challenges the foundations of our free educational institutions. The statute isolates particular groups of students for special, adverse treatment in an area—education—totally unrelated to the objective the statute is designed to advance—military preparedness. At the same time, Section 1113 forces the colleges and universities to adopt a relationship with their students which is at best unrelated to their educational pursuits, and at worst makes that relationship adversarial.

It is Swarthmore's hope that it may, in its role as *amicus curiae*, identify for the Court constitutional prob-

lems raised by Section 1113 not addressed by the parties. Having brought those problems to the Court's attention, we urge summary affirmance of the district court's decision. In the alternative, we respectfully ask that the Court note probable jurisdiction and provide the opportunity for full briefing and argument on these critical issues.

II. The District Court Correctly Identified Two Of The Constitutional Flaws In This Statute. These And Other Constitutional Infirmities Justify Summary Affirmance.

The analysis by the district court of the bill of attainder and self-incrimination arguments, discussed thoroughly by the respondents, requires no further comment from Swarthmore. We merely note that the Government has offered nothing new on these issues in its Jurisdictional Statement. The district court opinion carefully analyzed and applied the teachings of this Court, and therefore no substantial questions are raised by this case requiring the consideration of the Court.

Bolstering the decision of the court below are a number of other constitutional problems raised by Section 1113. The district court did not decide these issues, having already determined that the statute must fail for violation of the bill of attainder and self-incrimination provisions of the Constitution. However, these additional problems provide further justification for summary affirmance of the lower court.

Swarthmore makes no pretense of trying to develop fully these additional arguments here. We believe that merely identifying them for the Court's consideration will best fulfill the role of *amicus curiae* at this stage. Should the Court determine that summary affirmance is not ap-

propriate, we respectfully urge that it note probable jurisdiction and set the case for full briefing and argument. At that stage, we intend to ask for leave to participate as *amicus* to develop fully the arguments identified herein.

A. Section 1113 Is A Violation Of Equal Protection Under The Fifth Amendment Because It Discriminates Against Males And Particularly Against Male Members Of Minority Groups.

The first additional constitutional problem raised by Section 1113 is the statute's violation of equal protection provided by the due process clause of the Fifth Amendment to the Constitution. The statute requires that all students seeking federal assistance file statements of registration compliance asserting that the provisions of the Military Selective Service Act have been satisfied. While both male and female students are required to file these statements, only males are required to register for the draft, a requirement this Court has already found passes constitutional muster. *Rostker v. Goldberg*, 453 U. S. 57 (1981).

However, as a result Section 1113 penalizes only male students seeking federal educational assistance. While it is constitutionally permissible to require males only to register for the draft, it is not constitutionally permissible to penalize only males seeking federal educational assistance. The nexus between draft registration and federal funding for students attending post-secondary educational institutions is too tenuous to withstand constitutional scrutiny where the burden falls exclusively on one group of students.

In fact, this burden not only falls only on male students, but also falls most harshly on minority students who

are male. As Swarthmore argued before the district court, its minority students, both male and female, are much more dependent upon federal educational funding than are its non-minority students. Section 1113, by burdening the availability of federal funds, will have a dramatically greater impact on male students who are members of minority groups than on other groups seeking Title IV funding.

The principle of equal protection under the due process clause of the Fifth Amendment does not permit benefits to be denied to certain groups and not to others, at least without a strong justification. The need to enforce the draft registration law does not provide the kind of justification required under the Fifth Amendment.

B. The Rights Of Free Speech And Freedom Of Association Are Improperly Burdened By Section 1113.

Section 1113 also impinges on the rights to free speech and freedom of association of students holding pacifist views who may find the draft registration requirements morally abhorrent. Students holding such views have traditionally enrolled at Swarthmore in significant numbers, and it is important to Swarthmore that students holding such views continue to be able to enroll there.

Over 50% of the students attending Swarthmore have received federal educational assistance in the past. In the future, in order to receive such assistance, students may have to compromise their pacifist beliefs. The alternative, at least for those with limited financial means, will be not to attend private institutions such as Swarthmore. That is a result which cannot be justified by the need to

enforce the draft registration law, particularly where there are already ample enforcement mechanisms which do not impinge on the speech or association rights of the students.

C. Other Serious Deficiencies Of Section 1113 Add Weight To The Constitutional Arguments.

Finally, Section 1113 raises other serious problems which weigh the scales against sustaining the statute. These problems may not, by themselves, rise to the level of constitutional infringements. However, they provide further support for the contention that this statute is ill-conceived and improper.

In *Plyler v. Doe,* 457 U. S. 202, 102 S. Ct. 2382 (1982), this Court identified public education as a quasi-fundamental right, not a mere governmental benefit. *Id.* at 222, 102 S. Ct. at 2397. While *Plyler* dealt with the right to education at a lower level, it is instructive in the present situation. While Title IV of the Higher Education Act makes financial assistance available to those attending institutions of higher learning, the Government may not burden that benefit for some potential recipients for reasons utterly unrelated to the educational purposes served by Title IV. This becomes even more compelling where the burden falls only on particular groups of potential aid recipients.

Similarly, Section 1113 and the regulations thereunder, when those regulations as issued are fully phased in, will require colleges and universities to change the character of their relationships with their students by forcing on them a policing role antithetical to the educational goal of

these institutions. The burden and expense of this new role, as well as the nature of that role, are unjustified by the purpose served by Section 1113. When added to the constitutional problems identified above, it is clear that this statute should not be permitted to stand.

III. CONCLUSION

Swarthmore has attempted merely to identify, without further development, the numerous constitutional and other problems inherent in Section 1113. We believe that the district court properly found two of those problems insurmountable. The totality suggests that summary affirmance of the district court's opinion is justified.

In the alternative, Swarthmore urges this Court to note probable jurisdiction and grant the opportunity for full briefing and argument. At that stage, we intend to petition the Court for leave to participate as *amicus curiae*, so that we may develop in full the arguments identified above.

Respectfully submitted,

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Counsel for Swarthmore College

APPENDIX A

U. S. DEPARTMENT OF JUSTICE
Office of the Solicitor General
Washington, D. C. 20530

September 19, 1983

Dear Mr. Preston:

In response to your letter of September 14, 1983, I hereby consent to your filing a brief amicus curiae on behalf of Swarthmore College and Haverford College in *Selective Service System, et al. v. Minnesota Public Interest Research Group, et al.*, No. 83-276.

Sincerely,

/s/ Rex E. Lee
Solicitor General

DORSEY & WHITNEY
A Partnership including Professional Corporations

JAMES E. DORSEY
(612) 343-7988

September 19, 1983

Re: Selective Service System, et al.
v. MPIRG, et al.

Dear Mr. Preston:

On behalf of our clients, John Doe, Paul Poe, and Richard Roe, we consent to the filing by Swarthmore College and Haverford College of a petition to the United

States Supreme Court for leave to participate as *amici curiae* in the above action.

Very truly yours,

/s/ James E. Dorsey III

JED:pro
cc: E. Gail Suchman, Esq.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP

MPIRG

September 16, 1983

Re: No. 83-276; *Selective Service System, et al. v. Minnesota Public Interest Research Group, et al. & Bradley Boe, et al.*

Dear Mr. Preston:

On behalf of my clients, I am writing to inform you that we will have absolutely no objection to the petition of Swarthmore College and Haverford College for leave to participate as an *amicus curiae* before the United States Supreme Court in the above captioned action. In fact, we appreciate the support it represents.

Thank you for your efforts in this matter.

Very truly yours,

/s/ E. Gail Suchman

Attorney for Minnesota Public Interest Research Group, Bradley Boe, Carl Coe and Frank Foe

cc: William Keppel
Samuel Orbovich
Malcolm McDonald
William Donahue